Supreme Court, U.S.
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(2)

No. 00-720

IN THE

Supreme Court of the United States

CHUBB & SON, INC.,

Petitioner,

v.

ASIANA AIRLINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

THOMAS J. WHALEN
CONDON & FORSYTH LLP
1016 Sixteenth Street, NW
Washington, DC 20036
(202) 289-0500

CHRISTOPHER CARLSEN*
ANDREW J. HARAKAS
CONDON & FORSYTH LLP
685 Third Avenue, 14th Floor
New York, New York 10017
(212) 894-6700

Attorneys for Respondent

* *Counsel of Record*

28 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in holding that the United States (which is a party to the Warsaw Convention of 1929) and the Republic of Korea (which is a party to the Hague Protocol of 1955 that amends the Warsaw Convention) are not in treaty relations with respect to international transportation by air.

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Second Circuit:

1. Petitioner Chubb & Son, Inc., as subrogee of Samsung Semiconductor

2. Respondent ASIANA AIRLINES

STATEMENT PURSUANT TO RULE 29.6

Respondent ASIANA AIRLINES ("ASIANA") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. ASIANA does not have a parent corporation nor does any publicly held company own 10% or more of ASIANA's stock.

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Tai Ping Ins. Co. v. Northwest Airlines, Inc., 94 F.3d 29 (2d Cir. 1996) 3n

Tishman & Lipp v. Delta Air Lines, 413 F.2d 1401 (2d Cir. 1969) 3n

Treaties, Conventions and Protocols:

Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocols Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, ICAO Doc. No. 9147 (not yet in force) 8n

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Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (*reprinted in* note following 49 U.S.C.A. § 40105) ("Warsaw Convention") ..... *passim*

Convention for the Unification of Certain Rules for Carriage by Air, Signed at Montreal on 28 May 1999, DCW Doc. No. 57 (ICAO) (not in force) ("Montreal Convention") 8n, 9

Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, ICAO Doc. No. 8181 (entered into force 1 May 1964) 9n

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, Done at the Hague on 28 September 1955, 478 U.N.T.S. 371 (entered into force 1 August 1963) ("Hague Protocol") ..... *passim*

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol

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Done at the Hague on 28 September 1955, Signed at Guatemala City, on 8 March 1971, ICAO Doc. No. 8932 (not in force) ("Guatemala City Protocol of 1971") 8n, 10

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent ASIANA AIRLINES ("ASIANA") respectfully requests that the Court deny the Petition for a Writ of Certiorari ("Petition"), seeking review of the opinion of the Court of Appeals for the Second Circuit in this case, which is officially reported at 214 F.3d 301 (2d Cir. 2000) (App. 1a-31a).[1] The following Brief in Opposition is submitted pursuant to the letter of the Clerk of the Court, dated December 29, 2000, requesting ASIANA to submit a response to the Petition.

TREATY PROVISIONS INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (*reprinted in* note following 49 U.S.C.A. § 40105) ("Warsaw Convention"). The Warsaw Convention was amended by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, Done at the Hague on 28 September 1955, 478 U.N.T.S. 371 (entered into force 1 August 1963) ("Hague Protocol").

STATEMENT OF THE CASE

Petitioner Chubb & Son, Inc., the subrogated insurer of the shipper Samsung Semiconductor, brought this action against ASIANA seeking to recover damages for the non-

1. References preceded by "App." refer to the Appendix to the Petition for a Writ of Certiorari.

delivery of two cartons of computer chips shipped in 1995 by ASIANA from Seoul, Korea[2] to San Francisco. ASIANA transported the shipment by air from Seoul to Los Angeles, and then by truck from Los Angeles to San Francisco. The ASIANA air waybill listed Seoul and San Francisco as the places of departure and destination, respectively, but did not list Los Angeles. When the cargo arrived in San Francisco, two of the cartons in the shipment were discovered missing. These cartons weighed 17.65 kilograms each and had an alleged value of $583,000.

The issue presented to the courts below was whether Article 8(c) of the Warsaw Convention, which requires that the carrier's air waybill contain the "agreed stopping places" for the transportation, was applicable to this international air transportation between Korea and the United States.[3]

At the time of the shipment, the United States was a signatory to the Warsaw Convention, but not the Hague Protocol. Korea had not signed the Warsaw Convention but adhered only to the Hague Protocol, which amended the Warsaw Convention by, *inter alia*, deleting the Article 8(c)

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2. All references to Korea are to the Republic of Korea (*i.e.*, South Korea).

3. Under Article 9 of the Warsaw Convention, a carrier whose air waybill does not contain the information required by Article 8(c) cannot limit its liability in accordance with Article 22(2) of the Convention. Article 22(2) limits a carrier's liability for lost cargo to the maximum sum of $20 per kilogram or $9.07 per pound of such cargo unless the shipper specially declares a value for the carriage and pays a supplementary fee.

"agreed stopping place" requirement. The Hague Protocol also reworded Article 22(2) of the Warsaw Convention, but retained the same $20 per kilogram liability limitation. Accordingly, under the Hague Protocol, a failure to list an "agreed stopping place" does not preclude application of the limitation of liability under Article 22(2).

The district court correctly held that because Korea signed only the Hague Protocol, it could not be bound by the "agreed stopping place" requirement in Article 8(c) of the Warsaw Convention, and that requirement is not a part of the treaty agreement between the United States and Korea with respect to international aviation. App. 46a-47a. The district court, therefore, limited ASIANA's liability to $706 based upon the weight of the non-delivered goods in accordance with the liability limitation under Article 22(2) of the Warsaw Convention. App. 47a.

The Court of Appeals reversed, finding that Korea and the United States were not in treaty relations with respect to international aviation. App. 20a-31a.[4]

REASONS FOR DENYING THE WRIT

Petitioner offers two basic reasons as support for the grant of *certiorari*: (1) the decision of the court below is contrary to Warsaw Convention's goal of uniformity and the

4. Even though the court below found that no treaty relationship exists between the United States and Korea, ASIANA's liability still is limited in this case to the maximum sum of $20 per kilogram of goods lost by ASIANA in accordance with the Conditions of Contract in ASIANA's air waybill and ASIANA's tariffs on file with the United States Department of Transportation. *See Tai Ping Ins. Co. v. Northwest Airlines, Inc.*, 94 F.3d 29, 33 (2d Cir. 1996); *Tishman & Lipp v. Delta Air Lines*, 413 F.2d 1401, 1403 (2d Cir. 1969).

district court's decision in *In Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1466 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom., Chan v. Korean Air Line, Ltd.*, 490 U.S. 122 (1989); and (2) the decision of the court below has far reaching ramifications beyond the facts of this case. Petition at 9-13.

While ASIANA considers the decision of the court below to be incorrect, ASIANA cannot agree that the reasons offered by Petitioner are correct or sufficient to warrant *certiorari*. The decision of the court below, even if incorrect, is *not* in conflict with any decision of the Court or with the decision of any other Circuit Court of Appeals and will *not* have significant impact beyond this case.

A. The Decision of the Court Below Does Not Conflict With Any Decision of the Court or Affect the Warsaw Convention Goal of Uniform Liability Rules

Petitioner incorrectly claims that the decision of the court below "effectively overruled" the decision of the district court in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1466 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Petition at 9. While the decision of the court below is contrary to the district court's decision in *Chan*, it neither conflicts with nor addresses any issue before the Court in *Chan*. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

The district court in *Chan*, rejecting the argument espoused by the court below that Korea and the United States are not in treaty relations, held that "Korea has chosen to

adhere to the Hague Protocol and is therefore a High Contracting Party to the Warsaw Convention *through* those amendments. . . . At least with respect to the unamended portions of the Convention, the United States and Korea are parties to the same treaty." *In re Korean Airlines Disaster of Sept. 1, 1983*, 664 F. Supp. at 1469. The district court went on to address the ticket type size issue that eventually was affirmed by the Court in *Chan*, 490 U.S. at 123-35. Petitioner, however, ignores that the status of the treaty relationship between the United States and Korea was not appealed or addressed by either the Court of Appeals or the Court in *Chan*. The fact that no appeal was taken with respect to the district court's conclusion as to the treaty relationship between the United States and Korea can be attributed to two reasons.

First, all of the passenger actions involved in the *Chan* appeal involved round-trip transportation by air US–Korea–US and, therefore, were subject to the Warsaw Convention, even if Korea was found not to be a party to the Convention.[5]

More significantly, the district court's conclusion was supported by the Ministry of Foreign Affairs of the Republic of Korea, which considered the United States and Korea to be in treaty relations. The position of the Ministry of Foreign Affairs was set forth in a letter to Korean Air Lines Co., Ltd. (dated April 20, 1984):

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5. Article 1(1) states that the Warsaw Convention applies "to all international transportation of person, baggage, or goods performed by aircraft for hire." 49 Stat. 3014. Article 1(2) states that "international transportation" includes any transportation in which "the place of departure and the place of destination . . . are situated . . . within the territory of a single High Contracting Party, if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention." *Id.*

> 1. The United States of America is a party to the 1929 Warsaw Convention, but not to the 1955 Hague Protocol. The Republic of Korea joined the Hague Protocol and in accordance with the provision of Paragraph 2, Article 23 of the Protocol the Republic of Korea has a status of being a party to the Warsaw Convention as amended by the said Protocol; and
>
> (Note: Paragraph 2, Article 23 of the Hague Protocol:
>
> > "Adherence to this Protocol by any State which is not a party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.")
>
> 2. Therefore, it is the position of the Republic of Korea that the Republic of Korea and the United States are both parties to Warsaw Convention *except those provisions which have been changed by the Hague Protocol.*

Letter from the Ministry of Foreign Affairs, Republic of Korea, to Korean Air Lines (April 20, 1984) (emphasis added) (Opp. App. 1a-3a); *see also* Letter from Korean Air Lines to the Ministry of Foreign Affairs, Republic of Korea, Requesting Opinion as to Interpretation of the Warsaw Convention and Hague Protocol (February 1, 1984) (Opp. App. 4a-5a).[6]

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6. References preceded by "Opp. App." refer to the Opposition Appendix hereto.

The Korean Government's intent to be a party to the Warsaw Convention, *but only* to the extent not amended by the Hague Protocol is objectively evidenced by Article XXIII(2) of the Hague Protocol which provides:

> Adherence to this Protocol by any State which is not a Party to the [Warsaw] Convention *shall have the effect of adherence to the [Warsaw] Convention as amended by this Protocol.*

478 U.N.T.S. at 387 (emphasis added).

For this reason, the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 (1969), no matter how interpreted, is irrelevant because Korea expressed an intent to be a party to the Warsaw Convention only as amended by the Hague Protocol. The district court in *Chan*, as well as the district court below and in *Hyosung (America), Inc. v. Japan Airlines Co., Ltd.*, 624 F. Supp. 727, 728 (S.D.N.Y. 1985), properly concluded that Korea and the United States are parties the Warsaw Convention, except to those provisions which have been changed by the Hague Protocol. While the court below erred in deviating from this position, the decision in no way conflicts with any decision of the Court.

Similarly, the decision of the court below does not affect the uniformity goal of the Warsaw Convention or Hague Protocol because it does not address any specific liability provision of the Convention. The court below addressed only the issue of whether two states are in treaty relations. In any event, the uniformity goal of the Warsaw Convention cannot justify binding a State to all the terms of a treaty which it expressly and affirmatively has declined to accept.

B. The Decision of the Court Below Will Not Have a Significant Impact on Other Treaties and States

Petitioner's argument that the decision of the court below will have an impact beyond this case and will extend to other treaties simply is incorrect. Petition at 11-13.

Impact on Other Treaties. The issues addressed by the court below as to the treaty relations are unique to the "Warsaw System" of liability, as it has developed over the last 70 years. No other treaty scheme exists which is comprised of a combination of Conventions[7], Protocols[8] and Supplementary Conventions[9].

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7. *See* ***Warsaw Convention (1929)***; ***Montreal Convention (1999):*** Convention for the Unification of Certain Rules for Carriage by Air, signed at Montreal on 28 May 1999, DCW Doc. No. 57 (ICAO), reprinted in U.S. Treaty Doc. 106-45 (Sept. 6, 2000) ("Montreal Convention").

8. *See* ***The Hague Protocol (1955)***; ***Guatemala City Protocol (1971):*** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Guatemala City, on 8 March 1971 ICAO Doc. No. 8932 (not in force); ***Montreal Additional Protocol No. 3 (1975):*** Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocols Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, ICAO Doc. No. 9147 (not yet in force); ***Montreal Protocol No. 4:*** Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on October 12, 1929, as amended by the Protocol done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20, pp. 21-32 (1998) (entered into force in the United States on March 4, 1999).

(Cont'd)

In fact, due to this complex scheme, the International Civil Aviation Organization ("ICAO") recently adopted the Montreal Convention (1999), which is intended to update and repiace the existing "Warsaw System" of liability. While not yet in force, to date, 66 States (including the United States) have signed and 7 States have ratified the Montreal Convention. The Montreal Convention recently was transmitted to the U.S. Senate for advice and consent to ratification. *See Message for the President of the United States Transmitting The Montreal Convention*, Treaty Doc. 106-45 (Sept. 6, 2000). Petitioner, therefore, overstates the impact and significance of the decision of the court below. *See* Petition at 11-12.

Impact on Other States. Petitioner's final argument that as a result of the decision of the court below the United States now has no Warsaw Convention relations with "many nations," not only is an overstatement but is factually incorrect. *See* Petition at 12-13.

Petitioner overlooks that the issue presented below arises only in one-way transportation of passengers or cargo between the United States and a State that is a party to only the Hague Protocol. This issue does not arise in roundtrip transportation because of the definition of "international transportation." *See supra* note 5. In fact, while Petitioner lists 21 States as examples of States which, like Korea, are not in treaty relations with the United States, Petitioner simply is incorrect. According to ICAO, 154 States are parties to the Warsaw Convention and/or the Hague Protocol. Of these 154

9. *See* ***Guadalajara Supplementary Convention (1961):*** Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, ICAO Doc. No. 8181 (entered into force 1 May 1964).

States, 6 States (not 21 as Petitioner asserts) are party only to the Hague Protocol and not the Warsaw Convention: El Salvador, Grenada, Korea, Lithuania, Monaco, and Swaziland. *See* Table, Opp. App. 6a-8a.

Moreover, the United States recently ratified Montreal Protocol No. 4 ("MP4")[10], which amends the Warsaw Convention as amended by the Hague Protocol. Through its ratification of MP4 the United States effectively is in treaty relations with all States that have ratified only the Hague Protocol, in the same manner as Korea is in treaty relations with the United States. Thus, the United States is now also in treaty relations with El Salvador, Grenada, Korea, Lithuania, Monaco, and Swaziland.

Accordingly, even if the decision of the court below stands, its impact will be insignificant in the context of international transportation by air.

ASIANA agrees that the decision of the court below is wrong. However, ASIANA cannot agree that the reasons offered by Petitioner are accurate or justify *certiorari*.

Finally, the third question presented by Petitioner does not warrant review by the Court. The court below did not specifically address this issue and expressly remanded the issue of subject matter jurisdiction to the district court "to determine whether there exists some other ground for subject matter jurisdiction." App. 30a-31a.

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10. MP4 entered into force in the United States on March 4, 1999.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS J. WHALEN
CONDON & FORSYTH LLP
1016 Sixteenth Street, NW
Washington, DC 20036
(202) 289-0500

CHRISTOPHER CARLSEN*
ANDREW J. HARAKAS
CONDON & FORSYTH LLP
685 Third Avenue, 14th Floor
New York, New York 10017
(212) 894-6700

Attorneys for Respondent

* *Counsel of Record*

APPENDIX

대 한 민 국
외 무 부

조약741- 015839 (720-2337) 198 4 . 4 . 20 .

수신 대한항공(주) 사장

제목 조약해석문제

1. 대항 법무 제 7호(84.2.1.)와 관련된 것입니다.

2. 당부의 의견을 아래와 같이 통보합니다.

- 아 래 -

가. 미국은 바르샤바협약(1929 Warsaw Convention)의 가입국이나 헤이그의정서(1955 Hague Protocol)에는 가입하지 않았으며, 아국은 헤이그의정서에만 가입하였으나 동 의정서 제 23조 제 2항의 규정에 따라 동 의정서에 의하여 개정된 바르샤바협약에 가입한 지위에 있음.

* 헤이그의정서 제 23조 제 2항:

"Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol"

나. 따라서 1929바르샤바협약중 개정부분을 제외한 여타 부분에 대하여는 한.미 양국이 동일하게 수락하고 있으므로 동 부분에 관하여는 양국이 조약관계에 있다고 하여 [illegible]

외 무 부 장

국제조약 규정 제27조 제2항의 규정에 의거
국제기구조약국장 이 장 춘

LETTER FROM MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF KOREA, TO KOREAN AIR LINES (APRIL 20, 1984)

1a

BEST AVAILABLE COPY

ENGLISH TRANSLATION OF LETTER FROM MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF KOREA, TO KOREAN AIR LINES (APRIL 20, 1984)

MINISTRY OF FOREIGN AFFAIRS
REPUBLIC OF KOREA

April 20, 1984

Our Ref. No. JOYAG 741-015839

To : President
Korean Air Lines Co., Ltd.

Re: Interpretation of Treaties

Dear Sir:

In reference to your Daehang-Beobmu No. 7 dated February 1, 1984, please be informed of this Ministry's position/opinion as follows:

1. The United States of America is a party to the 1929 Warsaw Convention, not to the 1955 Hague Protocol. The Republic of Korea joined the Hague Protocol and in accordance with the provision of Paragraph 2, Article 23 of the Protocol the Republic of Korea has a status of being a party to the Convention as amended by the said Protocol; and

(Note: Paragraph 2, Article 23 of the Hague protocol:

"Adherence to this Protocol by any State which is not a party to the Conversion shall have the

effect of adherence to the Convention as amended by this Protocol.")

2. Therefore, it is the position of the Republic of Korea that the Republic of Korea and the United States are both parties to Warsaw Convention except those provisions which have been changed by the Hague Protocol.

Minister (Official Seal)
Foreign Affairs
Republic of Korea

Pursuant to Paragraph 2, Article 27 of the Government Official Documents Regulations, in sole discretion of

Name : Jang Choon Lee
Title : Director General
Bureau of International Organization & Treaties

LETTER FROM KOREAN AIR LINES TO MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF KOREA, REQUESTING OPINION AS TO INTERPRETATION OF THE WARSAW CONVENTION AND HAGUE PROTOCOL (FEBRUARY 1, 1984)

Korean Air Lines

February 1, 1984

Our Ref. No. Daehang-Beobmu 7

To: Ministry of Foreign Affairs
Republic of Korea

Attn: Director General
Bureau of International Organization & Treaties

Re: Request for Interpretation of Treaties

Dear Sir:

We, Korean Air Lines Co., Ltd. (KAL), are defending ourselves in the cases which have been filed in the United States against us for the damages by the breaved families of the deceased passengers abroad KAL Flight 007 shot down by the U.S.S.R. fighter on September 1, 1983.

As under such circumstances our attorneys in the U.S. have made inquires to us about the Republic of Korea (R.O.K.) Government position on the interpretation of Treaties, we hereby request your position/opinion on the following inquires:

1. R.O.K. Government adhered to the "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929" provided at Hague in 1955 (hereinafter referred to as "Hague Protocol") on July 13, 1967, ratified and promulgated on October 11, 1967.

In this connection, is it interpreted that R.O.K. Government's such adherence to the Hague Protocol has the same effect as the adherence to the "Convention for the Unification of Certain Rules Relating to International Carriage by Air, October 12, 1929" (hereinafter referred to as "Warsaw Convention"); and

2. Whether R.O.K. Government has a treaty relationship in respect of the Warsaw Convention with the United States of America which is a party to the Warsaw Convention.

We look forward to having your statement in this matter.

Choong-Hoon Cho
President
Korean Air Lines Co., Ltd.

TABLE — CURRENT STATUS OF CONTRACTING STATES REFERENCED BY PETITIONER TO THE WARSAW CONVENTION, HAGUE PROTOCOL AND MONTREAL PROTOCOL NO. 4

CONTRACTING STATE	WARSAW CONVENTION (1929)	HAGUE PROTOCOL (1955)	MONTREAL PROTOCOL NO. 4 (1975)
Benin	X	X	
El Salvador		X	
Grenada		X	
India	X	X	
Jordan	X	X	X
Republic of Korea		X	
Kenya	X		X

Lao People's Democratic Republic	X	X	
Lebanon	X	X	X
Lesotho	X	X	
Lithuania		X	
Malaysia	X	X	
Monaco		X	
Nigeria	X	X	
Pakistan	X	X	
Rwanda	X	X	
Samoa	X	X	
Sri Lanka	X	X	

Swaziland		X	
Tonga	X	X	
Zambia	X	X	